INTERIM REPORT
Nova Scotia Freedom of Information and Protection of Privacy
Report of Review Officer
Dulcie McCallum
FI-08-44

Report Release Date: March 25, 2009

Public Body: Nova Scotia Legal Aid Commission

Issues: Whether the Nova Scotia Legal Aid Commission ["Commission"] appropriately applied the *Freedom of Information and Protection of Privacy Act ["Act"]* and in particular:

1. Whether or not the information requested constitutes "personal information".
2. If the information is personal information, whether its disclosure is prohibited pursuant to s. 20 of the *Act*, or whether it falls within one of the exceptions to the prohibition contained in section 20(4).
3. Can information that is found to constitute "personal information" be severed from the Record, in accordance with s. 5(2) of the *Act*?

Records at Issue: The Record at issue in this Interim Review is comprised of the following:

1. The Third Party's absentee report [Record #1].
2. The Third Party's pay stubs for the relevant time period [Record #2].

The outstanding portion of the Record that is not part of this Interim Report is as follows:

3. Daily time reports accounting for the number of hours spent on files for the number of hours billed on files for the relevant time period [Record #3].

Summary: The Applicant requested information from the Commission about a Third Party legal aid lawyer's absentee report, pay stubs and billing hours for a specific period of time. After requiring the Applicant to pay the required fee by certified cheque, the Commission refused to disclose the information

to the Applicant citing the exemptions of solicitor-client privilege and personal information. The Commission forwarded a portion of the responsive Record to the Review Office, but the Commission has refused to provide the Review Officer with access to the portion of the Record containing billing hours and the Review Officer has made an application to the Supreme Court of Nova Scotia for its production. This Interim Review deals with the first two portions of the responsive Record.

The Applicant submitted that the Third Party testified to the Court about his/her illness that should be contained in the absentee report. The Applicant submits that because the information has already been made public by the Third Party's own testimony to the Judge, that personal information exemptions claimed would not be violated.

Regarding the pay stubs, the Applicant submitted that the Commission had provided the salary scale for the period in question the access request for pay stubs is not subject to the personal information exemption.

The Commission submitted that the information was personal information and therefore could not be released.

The Commission sought to have the Review Officer clarify the standard of review employed in Reviews under the *Act* prior to making its final submission. The Review Officer refused to do so and advised the Commission that asking for this kind of preliminary question to be answered by an independent oversight body outside the parameters of the Review itself was wholly inappropriate.

Findings:

1. The Record at issue in this Interim Review does not fall under the Routine Access Policy of the Commission.
2. The Nova Scotia Legal Aid Commission is listed in the Schedule of the *Act* as a public body under the *Act*.
3. The Third Party is a staff person working for the Commission and is considered a public servant and an employee under the *Act.*
4. The Commission gave notice to the Third Party that personal information about him/her was the subject of an Application for Access to a Record.
5. The Commission can seek the consent of the Third Party regarding the release of the responsive Record but is not obliged to rely on it.
6. The Commission's failure to provide the Applicant with a letter advising of the need to notify the Third Party was contrary to the requirements imposed on a public body under the *Act*.

7. The Commission made its decision within the 30 day statutory requirement.
8. Failing to advise the Applicant of the application fee requirement promptly was inconsistent with the duty to assist and imposing the need for the cheque to be certified was contrary to the provisions of the *Act* and the *Regulations*.
9. When the Third Party responded to the Commission seeking consent to the release of the Record, at no time did s/he claim solicitor-client privilege on behalf of a client but chose only to refuse consent on the basis that disclosure would be an unreasonable invasion of his or her privacy. While the Commission was only notifying the Third Party that an Application for Access to a Record had been made with respect to information that may be personal information, had the Third Party solicitor considered the information privileged on behalf of his or her client, it would have been reasonable to assume that the solicitor-client privilege would be claimed.
10. The onus is on the Commission to prove a record contains information falling within the definition of personal information. Record #1 consists of a Third Party's attendance record at work and Record #2 the regular pay schedule showing salary. Record #1 is information that can be characterized as "information about an identifiable individual including information about the individual's health-care history" and Record #2 could fall within the meaning of "information about an identifiable individual including information about the individual's…financial…or employment history" and therefore both Record #1 and #2 fall within the definition of personal information under the *Act.*
11. Because the information sought falls within the definition of personal information, the onus is on the Applicant to prove that disclosure of this personal information would not result in an unreasonable invasion of the Third Party's privacy.
12. The Applicant successfully demonstrated that disclosure of Record #1 would not be an unreasonable invasion of the Third Party's privacy because the Third Party has already put the information in the public domain. The Third Party made the information public and therefore cannot try to now shield it from the Applicant.
13. The exception to the exemption in s. 20(4)(e) applies to the information because it is about the Third Party's remuneration as an employee of a public body.

14. Record #2 can be released to the Applicant with a modest amount of severing [Third Party's Employee ID number and home address].
15. The Commission is not an administrative tribunal under the *Act.*
16. The Freedom of Information and Protection of Privacy Review Officer is an independent oversight administrative body set up under the *Act* whose reports with findings and recommendations are entitled to deference from the Courts. In the result, in most instances, the test for a reviewing Court will be reasonableness not correctness.

Recommendation: The Review Officer recommends that the Nova Scotia Legal Aid Commission release to the Applicant Record #1 in its entirety and Record #2 with minimal severing of the Third Party's employee identification number and home address.

Key Words: absentee reports, employee, employment history, legal aid, mandatory exemption, pay stubs, personal information, remuneration, salary scale, sick days, solicitor-client privilege, standard of review, third party, timeliness.

Statutes Considered: *Freedom of Information and Protection of Privacy Act, s. 2, 3, 3(1)(b), 3(1)(i), 3(1)(vi), 3(1)(vii), 5(2), 7(2), 16, 20, 20(1), 20(3)(a), 20(3)(f), 20(4)(e), 45; Legal Aid Act RSNS 1989 c. 252; Provincial Finance Act RSNS 1989 c. 365.*

Case Authorities Cited: *NS Review Reports FI-00-98; ON Orders MO-2222, MO-128; BC Orders F08-20, 43-1995, 112-1996; Doctors Nova Scotia v. Nova Scotia (Department of Health), 2006 NSCA 59; Dickie v. Nova Scotia (Department of Health) (1999), 176 N.S.R.(2d) 333 (C.A.); Re House, [2000] N.S.J. No 473 (S.C.); Dunsmuir v. New Brunswick, [2008] SCC No. 9; Law Society of New Brunswick v. Ryan [2003] 1 SCR 247; Lienaux v. NS Barristers' Society, 2009 NSCA 11; McCormick v. NS (Attorney General) et al.*

Other Cited: *Routine Access Policy Nova Scotia Legal Aid Commission February 27, 2004; Legal Aid Commission Website.*

REVIEW REPORT FI-08-44

BACKGROUND

By letter dated May 20, 2008, the Applicant requested access to a Record concerning an employee of the Nova Scotia Legal Aid Commission ["Commission"], a named legal aid lawyer ["Third Party"], and after providing background details, requested the following:

> *Under the Freedom of Information and Protection of Privacy Act.*
> 1. *Could you please forward to me the sick days that [Third Party] has put in for with the legal aid commission in [his/her] pay from the dates Feb. 10/08 till March 5/08.*
> 2. *If this is not available under FOIPOP then could you sever this information from your response and forward to me the Regular Pay schedule [Third Party] received from the dates for Feb. 10/08 till March 5th/08.*
> 3. *As I believe [Third Party] is on a salary, but am not positive to this matter, if [s/he] is actually on a billing schedule for hours, could you please forward these to me for the time Feb. 10/08 to March 5/08."*

By letter dated May 28, 2008, the Commission notified the Third Party that an application had been made under the *Freedom of Information and Protection of Privacy Act* ["*Act*"] for information pertaining to sick leave. That letter provided in part:

> *The Applicant seeks information pertaining to sick leave you would have taken in the time period February 10, 2008 through to March 5, 2008.*
>
> *In the event that the personal information relating to your sick leave is not provided, the applicant then asks for your payroll records for the same time period. The applicant is also seeking your billing records for the same time frame.*
>
> *As the person responsible for dealing with requests made pursuant to the FOIPOP Legislation, I'm obliged to ask you whether you consent to the release of this information. At your earliest convenience, please advise [sic] to whether you consent to the release of this information. Thank you for your assistance and cooperation in this matter.*

The Commission neglected to give notice to the Applicant in writing that Third Party notification was necessary, as is required by the *Act*.

The Commission, on the same date of May 28, 2008, wrote the Applicant informing him/her that an Application Fee of $25.00 is required prior to the access application being processed. The Commission's letter in this regard advises the Applicant that the fee must be paid by certified cheque. The Commission failed to

provide a copy of this correspondence to the Review Office at the Intake stage, as is required by the legislation.

By letter dated June 9, 2008, the Third Party responded to the Commission's letter, stating:

> *I have reviewed your request of May 28th for information regarding my sick leave earlier this year, my payroll records and my billing records, all for the same time frame.*
>
> *I have considered this matter and I believe that forwarding this information would be an unwarranted and unreasonable invasion of my privacy and I am therefore declining to provide my consent to this request.*

On June 26, 2008 the Commission provided its decision to the Applicant, which states:

> *With respect to your first and second request for information as set out above, you have the Commission's correspondence to you dated April 30, 2008.* [A decision made under the Commission's Routine Access Policy] *Section 3(1)(i) of the FOIPOP Legislation defines what is meant by "personal information". In dealing with the definition of "personal information", the Legislation specifically identifies at (vi) the issue of "information about the individual's health care history" and also at (vii) identifies the issue of "information about the individuals . . . employment history".*
>
> *Section 20 of the Legislation under the heading Personal Information at subsection (3) states that "a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if (a) the personal information relates to a medical, dental, psychiatric, psychological or other health-care history, diagnoses, condition, treatment or evaluation."*
>
> *On the basis of the provision of the Legislation as referenced, your request for personal information relating to an employees sick days for the dates February 10, 2008 through to March 5, 2008 is refused. You have also requested the employees "Regular Pay schedule" for the dates February 10, 2008 through to March 5, 2008. These are also refused on the basis that this is personal information, release of which would be "presumed to be an unreasonable invasion of a third party's personal privacy" as such information is per Section 20(3)(f), personal information that describes the third party's "financial history or activities".*
>
> *With respect to your second request, the Commission can provide the salary scale for the employee's position. The position is defined as Senior Staff Counsel in the Nova Scotia Legal Aid Commission Staff Lawyer Pay Plan Policy and the range of income is $119,055.33 to $125,065.77.*

In your third request you have made reference to "a billing schedule for hours". This billing schedule for the employee will not be released as this is information that is subject to Solicitor/Client Privilege. Section 16 of the FOIPOP Legislation states as follows:

> *"The head of a public body may refuse to disclose to an applicant information that is subject to solicitor-client privilege."*

The decision letter goes on to explain the process by which the Applicant can request a Review of the Commission's decision with this Office.

On a Form 7 Request for Review dated July 3, 2008, the Applicant requested a Review of the Commission's decision dated June 6, 2008, and asked that:

> *. . . that the review officer recommend that the head of the public body give access to the record as requested in the Application for Access to a Record.*

The Applicant provided a letter with the Form 7, details of which will be outlined in the Applicant's Submission below.

On July 8, 2008, the Review Office acknowledged receipt of the Applicant's Form 7 and made a request to the Commission to provide a complete copy of the responsive Record and all other pertinent information including any and all correspondence to and from the Applicant.

On July 15, 2008, the Commission requested a meeting with the Review Office stating that it did not receive many Review Requests and wanted information regarding the process. The Commission expressed concern during the meeting about releasing the Third Party information to the Review Office because it was personal information. The following issues were discussed:

1. The *Act* requires public bodies to provide the responsive Record to the Review Office within 15 days of receiving notice from the Review Office;
2. The Review Office does not disclose records to applicants and does not reveal the contents of the records;
3. When asked where the *Act* says a public body has to give the Review Office the records, the Review Office pointed out s. 38 of the *Act* and explained the powers of the Review Officer.
4. The Commission asked for a letter from the Review Office explaining the powers, stating this would assist in obtaining the consent of the Third Party to release the Records to the Review Office. It was explained to the Commission that the Third Party does not have any say in whether the Review Office receives a copy of the Record.
5. The Commission went on to discuss a precedent from the former Review Officer where he had said solicitor-client privileged records should not go out. In that case, the Review Officer had the Record. The remainder of the discussions were an attempt by the Review Office to assist the Commission to

understand that the former Review Officer may have said that with respect whether an **applicant** should not get a record under s. 16 of the *Act* but not whether the **Review Officer** should be given the record.

On July 18, 2008, the Review Office sent a letter to the Commission confirming what was discussed in the aforesaid meeting. The letter cited s. 38 of the *Act* in full and made reference to s. 22 of the Regulations that requires the records to be delivered to the Review Office within 15 days of the original request. The Review Office requested that the Record, now long overdue, be provided no later than July 30, 2008. In addition, though this matter was still at the Intake stage, because the Commission seemed to be misunderstanding the applicability of the solicitor-client privilege, four Nova Scotia cases were provided all involving the solicitor-client exemption and all cases clearly stating that the pertinent record had been provided to the Review Officer.

On July 31, 2008, the Commission advised the Review Office by phone that it was refusing to provide a copy of Record #3.

By letter dated July 30, 2008, the Commission sent the Review Office responsive Records #1 and #2 along with a representation, details of which will be outlined in the Public Body's Submission below. The Review Office was denied a copy of the third Record citing solicitor-client privilege, which issue was referred directly to the Review Officer. The Review of the issues regarding the third responsive Record, which has been refused to the Review Officer, does not form part of this Interim Review and will ultimately be the subject of a Review Report once the matter has been dealt with in the Nova Scotia Supreme Court.

On August 11, 2008, the Commission requested another meeting with the Investigator and one with the Review Officer. The Commission indicated they required more information than had already been provided to it by the Review Office because of its lack of experience with the Review process. The Commission indicated the meeting with the Investigator would prevent findings going to the Applicant prior to it having a chance to respond. The Review Office explained that the Investigator does not make findings and only the Review Officer can make findings and recommendations under the *Act.*

On August 13, 2008, the Review Officer demanded production of the remaining portion of the responsive Record from the Commission. That correspondence provided:

> *Please send all outstanding relevant records, namely the "daily time reports accounting for the number of hours spent on files for the relevant time period."*
>
> *All responsive records that are relevant to an access request must be sent to the Review Officer, pursuant to Section 38 of the Freedom of Information and Protection of Privacy Act.*
>
> *As indicated previously, records are never released or their contents disclosed to an applicant by the Review Officer. As such, by providing these records, you are not waiving the client's solicitor-client privilege.*

As you know, the purpose of the Review Officer receiving a copy of the records is so that they can be examined to see if the exemption claimed has been done so in accordance with the definition of the exemption and is applicable to the responsive records. In order to do this, the actual records must be examined.

As the Review Officer, after I have reviewed the original decision made by you with respect to all the records and the exemptions claimed, I will make findings and recommendations to you as the public body, which you can accept or reject.

If the outstanding records are not received on or before ***August 29, 2008****, I will pursue the records via the remedy available to me under the Act.*

Please ensure that all subsequent correspondence between yourself, the Applicant and any affected third parties regarding this matter is copied to the Review Office.

If you have any further questions about this process, please do not hesitate to contact me.

The Commission did not comply with the demand to produce the outstanding portion of the Record and refused to tell the Review Officer the location of the Record to enable her to attend the premises and view the Record. The issue with respect to the refusal of the Commission to produce the whole Record has been referred to counsel to make an application to the Nova Supreme Court for an Order for its production. The file was broken into two parts and the Review of the first two portions of the Record continued to be processed at the Review Office.

On December 23, 2008, the Investigation Summary was sent to the parties.

On February 13, 2009, the Review Office invited the Commission and Applicant to provide written submissions to the Review Officer as Mediation was unsuccessful and the matter had been referred to formal Review. The parties were asked to provide their submissions by February 26, 2009.

The Applicant's representation was received on February 25, 2009, the contents of which are found in the Application's Submission below.

On March 2, 2009, a brief was received from the Commission requesting clarification as to the standard of review applied by the Review Officer prior to it submitting its final representations. On March 3, 2009, the Review Officer responded to the Commission as follows:

The statute does not contemplate this kind of question prior to the formal Review being conducted and completed. Your inquiry is inappropriate. Certainly it is open to you to make a submission to the Review Officer as to the appropriate standard of Review she should employ as part of your Representations. Should I find you have not made a decision in accordance with the FOIPOP Act and you take issue with the standard of review applied, your remedy is to ignore my

Findings and Recommendations and if the Applicant appeals your decision to the Supreme Court of Nova Scotia you can argue the appropriate standard of review to be used. In that regard, if you wish your letter about standard of review received yesterday [March 2, 2009] included as part of your representations, please indicate accordingly.

The correspondence went on to remind the Commission that its representations were late and that if it planned to make a further submission it needed to do so by March 6, 2009, which date was extended due to the Commission's Freedom of Information and Protection of Privacy Administrator being absent from the office.

On March 9, 2009, the Commission made a final submission by email, details of which will be reviewed in the Public Body's Submission below.

On March 11, 2009, the Review Office brought to the attention of the Commission that there was correspondence referred to by the Applicant in his/her submission that the Review Office did not have a copy of on file:

I have since received a copy of the Commission's May 28, 2008 letter provided by the Applicant. The May 28th letter is about fee payment and does not mention Third Party notification. The Statute requires that you give notice to the Applicant that a Third Party has to be notified. My request to you was in this vein as I assumed such notice was given to the Applicant in accordance with the Statute. I acknowledge that my request of you was with respect to "Third Party notice was required" but the fact remains that the statute requires that you provide the Review Officer with all correspondence between the Public Body and the Parties. We have never received a copy of the May 28th letter regarding fees from you.

While the above could have been an oversight on your part, it leaves me wondering if there is other documentation that has not been provided to this office by you. As such, I am asking you to review your file and forward any documents that have not been provided to the Review Office. Failure to ensure all documentation is provided to the Review Office can be the subject of comment in the Review Report.

On March 12, 2009, the Commission faxed correspondence that confirmed there was no other correspondence and provided a copy of the May 28th letter sent to the Applicant, which the Review Office had received from the Applicant. The Commission explained its failure to provide notice to the Applicant as required by the statute, as follows:

With respect to your email sent March 11, 2009 and the reference to a statutory requirement that the Commission give notice to the Applicant that a Third Party had to be notified, the Commission's response to the Applicants [sic] request for information was guided by s. 22(1A)(a) of the FOIPOP Legislation. The Commission proceeded on the premise that if subsection (1) of s. 22 did not apply

and no notice was given to the Third Party, then subsection (2) of s. 22 did not require that a notice be sent to the Applicant.

This statement is somewhat curious given that the Commission did give notice to a Third Party under s. 22(1). That means s. 22(2) automatically comes into play imposing a statutory duty on the Commission to give notice to the Applicant. Section 22(1A), which waives the requirement to give an applicant notice, has no application in this case as it only applies when the public body has already decided to refuse access to a record or it is not practical to give notice to a third party.

The Applicant originally made a request for a portion of the above noted information through the Commission's Routine Access Policy. A decision was made regarding that request on April 30, 2008. Requests for information under a Routine Access Policy do not fall under the *Act* and are not within the Review Officer's jurisdiction. Therefore that request and subsequent decision do not form part of this Review, notwithstanding that the Commission referred to it in its decision letter to the Applicant.

RECORD AT ISSUE

The Record at issue in this Review is comprised of the following:

1. The Third Party's absentee report [Record #1].
2. The Third Party's pay stubs for the relevant time period [Record #2].

The outstanding portion of the Record that is not part of this Interim Report is as follows:

3. Daily time reports accounting for the number of hours spent on files for the for the number of hours billed on files for the relevant time period [Record #3].

With respect to Record #3, the Commission has refused to provide the Review Officer with access to this Record. As such, the Review Officer has made an application to the Supreme Court of Nova Scotia for its production. This Interim Review Report is only about Records #1 and #2. After this Interim Report has been issued on these two parts of the Record, the remaining item [Record #3] will be the subject of a Review once the legal proceedings are complete.

Without revealing the actual content of the Record, the following are the types of information that are found within the Record:

Record #1, Absentee Reports:

- Applicable month, office name, the Third Party's name, row for leave code, row for hour, column for each day of the month, columns for totals and column for the initials of employee.

Record #2, Pay Stubs:

- Payment date, pay end date, earnings – current and year to date, deductions – current and year to date, net pay, the Third Party's name, the Third Party's home address, the Third Party's employee number, the Third Party's occupation, pay period number.

APPLICANT'S SUBMISSION

On July 3, 2008, the Applicant expanded on the Form 7 with a submission which can be summarized as follows:

1. What should first be considered is:
    a. The purpose of the *Act* in s. 2 is to ensure that public bodies are fully accountable to the public;
    b. Whether disclosure would have the effect of increasing public confidence in government;
    c. If the disclosure of the information would actually violate the personal information [refers to s. 3(1)(i)(vi) and (vii) and s. 20(3)(a) and 20(3)(f)] and violate information subject to solicitor-client privilege [refers to s. 16].
2. By way of background, also included in the Applicant's original request for access, the Third Party testified to the Court that due to illness s/he was unable to prepare for the case. The Applicant submits that because the information has already been made public by the Third Party's own testimony to the Judge, that exemptions claimed would not be violated.
3. In addition, with respect to s. 3(1)(i)(vi) and s. 20(3)(a) the information sought is not personal information that relates to medical, dental, psychiatric, psychological or other health-care history, diagnosis, condition, treatment or evaluation but rather just the fact that sick days were claimed for the period in question. Disclosing the sick days would not disclose personal information as defined in the *Act*.
4. With regards to s. 20(3)(f) and 2(1)(i)(vii) about a Third Party's educational, financial, criminal or employment history, it is clearly within the public's knowledge that the Third Party is employed by the Commission and seeking information with respect to his/her wages or billing hours for the period in question could not be mistaken as seeking financial history.
5. In the Commission's decision letter it provided the Applicant with the salary scale for the employee position held by the Third Party. The Applicant argues that to provide the wage history for the period in question would be approximately $1/12^{th}$ of that amount and therefore the access request is not seeking information protected by the sections cited above.
6. The Applicant states that if there was information protected by solicitor-client privilege that section would be severed from the Record. The Applicant submits that asking for billing hours generally and not about a specific case would not involve anyone's name and therefore would clearly not interfere with solicitor-client privilege.

On January 8, 2009 correspondence was received by the Review Office from the Applicant that was in response to reviewing the Investigation Summary. The Applicant indicated s/he wanted the contents be considered part of his/her representation to the Review Officer. That letter can be summarized as follows:

1. Nowhere in the Applicant's request for sick days of the Third Party did the request fall under the section about personal information that "relates to a medical, dental, psychiatric, psychological or other health-care history, diagnosis, condition treatment or evaluation [sic]". Citing supporting case law, the Applicant argues:

   > *To qualify as personal information, the information must be about the individual in a personal capacity. As a rule information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.*
   > *[MO-2172]*

2. The Applicant argues that the access request for information about sick leave stems from the Third Party's letter to the Judge dated March 3, 2008, which states "[I] am out sick today" and that s/he may be seeking an adjournment for the trial scheduled to begin the next day.
3. The Applicant also relies on an affidavit of one of the parties to the matter set for trial in which that person refers to the Third Party's illness as being the cause of the trial not proceeding. The Applicant argues that the Third Party is clearly operating in his/her business capacity with respect to the information about the illness.
4. Again quoting from the Investigation Summary, the Applicant states the question is:

   > *Is there something about the particular information at issue that, if disclosed would reveal something of a personal nature about the individual? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?*

5. The Applicant submits the access request is not about why the Third Party was out sick. It is expected that employees will get sick. Asking about what sick days were taken is different than asking about the nature of the illness. Providing this information, the Applicant argues, is not an invasion of the person's privacy.

Responding to the invitation from the Review Office to do so as part of the formal Review, the Applicant filed a final representation by letter dated February 25, 2009. The Applicant indicates that much of what s/he had to say was included in the letter dated January 8, 2009 but at the risk of repeating, reiterated some of the points including the following:

1. The access request was refused under s. 20 of the *Act*, which the Applicant argues does not apply. Requesting a record recording the number of sick days in a specific time period is not requesting any information about the nature of the Third Party's illness.
2. Employment contracts include provision for sick days and are thus recorded in employment records of individuals. The nature of the illness would not be included other than in personnel files that would be confidential.
3. Information about sick days provided by the Third Party's employer would fall under the provision in s. 20(4)(f). This section provides that a disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if the disclosure reveals financial and other similar details of a contract to supply goods or services to a public body. The Applicant argues that sick days would be part of the contract for the employment of the Third Party and thus would fall under this provision.
4. If the Applicant is wrong in his/her submission that sick days are part of the contract of employment, the disclosure of the sick day record would not be an unreasonable invasion of the Third Party's privacy. The Applicant gives a few real life examples to simply make the point that disclosing someone is ill without giving the particulars is not a breach of privacy.
5. The Third Party has made public the sick days taken both by letter to the Judge who granted an adjournment and the Third Party's client has made the illness of his/her lawyer public by making reference to it in an Affidavit filed with the Court. The Third Party has already made his/her sick days a public matter related to his/her "professional business capacity" and therefore s/he cannot try to shield access to a record of those sick days by claiming breach of privacy.
6. The Applicant concludes by taking issue with the promptness of the Commission in responding to the access request and its inability to meet the timelines under the statute, especially related to giving notices under s. 22 of the *Act.*

PUBLIC BODY'S SUBMISSION

The Commission indicates that its first submission for the purpose of the formal Review is what was contained in its decision letter to the Applicant dated June 26, 2008, which is cited in full above in Background. For ease, it is reproduced here:

> *With respect to your first and second request for information as set out above, you have the Commission's correspondence to you dated April 30, 2008.* [A decision made under the Commission's Routine Access Policy] *Section 3(1)(i) of the FOIPOP Legislation defines what is meant by "personal information". In dealing with the definition of "personal information", the Legislation specifically identifies at (vi) the issue of "information about the individual's health care history" and also at (vii) identifies the issue of "information about the individuals . . . employment history".*

Section 20 of the Legislation under the heading Personal Information at subsection (3) states that "a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if (a) the personal information relates to a medical, dental, psychiatric, psychological or other health-care history, diagnoses, condition, treatment or evaluation."

On the basis of the provisions of the Legislation as referenced, your request for personal information relating to an employees [sic] sick days for the dates February 10, 2008 through to March 5, 2008 is refused. You have also requested the employees [sic] "Regular Pay schedule" for the dates February 10, 2008 through to March 5, 2008. These are also refused on the basis that this is personal information, release of which would be "presumed to be an unreasonable invasion of a third party's personal privacy" as such information is per Section 20(3)(f), personal information that describes the third party's "financial history or activities".

With respect to your second request, the Commission can provide the salary scale for the employee's position. The position is defined as Senior Staff Counsel in the Nova Scotia Legal Aid Commission Staff Lawyer Pay Plan Policy and the range of income is $119,055.33 to $125,065.77.

In your third request you have made reference to "a billing schedule for hours". The billing schedule for the employee will not be released as this is information that is subject to Solicitor/Client Privilege. Section 16 of the FOIPOP Legislation states as follows:

> *"The head of a public body may refuse to disclose to an applicant information that is subject to solicitor-client privilege."*

On July 30, 2008, the Commission provided a submission to the Review Office. After referring to the two parts of the responsive Record that it had enclosed and the reasons given for denying the Application for Access to a Record that were outlined in its decision dated June 26, 2008, the Commission made a further submission as follows:

1. Citing *para. 12* of *Dickie v. Nova Scotia (Department of Health)* the Commission states it is relying on the factors set out at s. 20(2)(a), (c) and (f) of the *Act*.
2. Citing *para. 45-46* of *Dickie* as follows:

> *The term "employment history" is not defined in the **Act**, but both the words themselves and the context in which they are used suggest that the ordinary meaning of the words in the employment context is intended. In the employment context, employment history is used as a broad and general term to cover an individual's work record. As Commissioner Flaherty put it in **Order No. 41-1995; British Columbia (Minister of Social Services), [1995] B.C.A.P.C.D No. 14:***

> *I agree . . . that employment history includes information about an individual's work record. I emphasize the word "record" because in my view this incorporates significant information about an employee's performance and duties. (at p. 6)*

Section 20(3)(d) emphasizes the generality of the expression by speaking not simply of personal information which is employment history, but of personal information which "relates to" employment history. The importance of privacy in this area is further underlined by the specific prohibition of disclosure respecting labour relations matters in s. 21(1) and by the much more confined entitlement to information relating to the "position, functions or remuneration as an officer. . . of a public body. . ." in s. 20(4).
[Emphasis in original]

3. The Commission also considered para. 55 of the *Dickie* decision and cited it as follows:

> *However, the judge's balancing of the factors was incorrect because of the error in failing to find the disputed information was personal information related to employment history. In the case of personal information related to employment history, the **Act** presumes that the balance is in favour of privacy because it presumes that disclosure of personal information relating to employment history is an unreasonable invasion of personal privacy. The judge held, in effect, that the citizen's right to know trumps a third party employees' right to privacy, saying that if an employee ". . . apparently or actually misuses the power vested in the employee as a consequence of employment, an aggrieved citizen has a right to be adequately advised of the nature and the results of an investigation into the allegation of wrongdoing. . ." I think the judge erred in reaching this conclusion when the explicit presumption of the **Act** is the opposite. The error was not in failing to do the balancing but in failing to start the balancing with the presumption in favour of privacy of this type of information.*
> ***[Emphasis in original]***

4. The remainder of the submission is representation with respect to why the Commission has refused to provide a portion of the Record to the Review Officer. That discussion begins with the following statement:

> *As you are aware, from the Commission's correspondence to the applicant dated June 26, 2008 and our discussions at our meeting on July 16, 2008, the Commission cannot provide the records described at item number 3 as these records are subject to solicitor-client privilege. The Commission has given careful consideration to the broad and plain language of s. 38(1) of the **Act**, under the heading of **Duties and Powers of Review Officer**. The Commission takes the position that the words*

> *"Notwithstanding any other Act or any privilege that is available at law" as found at the outset of s. 38(1) are general and at most might include the solicitor-client privilege that the Nova Scotia Legal Aid Commission, as a public body, might be able to claim. In the instant case the Commission is not advancing a claim of solicitor-client privilege that it might enjoy in its corporate capacity. . .*
> ***[Emphasis in original]***

The submission continues to discuss the exemption of solicitor-client privilege, which is not relevant to this Interim Review Report.

The Commission did not provide its interpretation or analysis to the two portions of the Record refused to the Applicant. The Commission simply provided the paragraphs of the judicial decision it relied on without relating those to portions of the responsive Record that had been refused.

On March 9, 2009, the Commission made the following final submission to the Review Officer:

> *In addition to submissions previously made, the Nova Scotia Legal Aid Commission makes the submissions that follow.*
>
> *The position of the Commission is that the disclosure of the **third parties'** [sic] **pay stubs** and the **third parties'** [sic] **absentee reports** unreasonably invade the third parties' [sic] privacy.*
>
> *The Commission submits that the consideration of the circumstances under s. 20(2) of the **FOIPOP Act** does not rebut the presumption under s. 20(3)(a)(b) and (f) that the disclosure would unreasonably invade the third parties' [sic] privacy.*
>
> *The Commission cites **Doctors Nova Scotia v. Nova Scotia (Department of Health), 2006 NSCA 59** at paragraph 36 as follows:*
>
> > *"The s. 20(2) analysis is a balancing exercise, but not from a level scale. It begins with the weighted presumption under s. 20(3)(f) that the disclosure would unreasonably invade the physicians' privacy. The question is whether the circumstances cited in s. 20(2) overcome this presumption. The proponent of rebuttal must defined and establish her proposition."*
>
> *This concludes the Commission's submissions on the two items of requested disclosure.*
> ***[Emphasis in the original]***

DISCUSSION:

The Applicant's right to access information under the *Act* is stated in the purpose section, which provides:

> *2 The purpose of this Act is*
>
> > *(a) to ensure that public bodies are fully accountable to the public by*
> >
> > > *(i) giving the public a right of access to records,*
> > > *(ii) giving individuals a right of access to, and a right to correction of, personal information about themselves . . .*

ISSUES

The issues in this Review are as follows:

1. Whether or not the information requested constitutes "personal information".
2. If the information is personal information, whether its disclosure is prohibited pursuant to section 20 of the *Act*, or whether it falls within one of the exceptions to the prohibition contained in section 20(4).
3. Can information that is found to constitute "personal information" be severed from the Record, in accordance with section 5(2) of the *Act*?

PERSONAL INFORMATION – MANDATORY EXEMPTION

There is only one type of exemption being applied by the Commission to the two portions of the Record at issue in this Review. The exemption in s. 20 of the *Act* is mandatory and reads as follows:

> ***(1)****The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.*
>
> ***(2)****In determining pursuant to subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances, including whether*
>
> > *(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Nova Scotia or a public body to public scrutiny;*
> > *(b) the disclosure is likely to promote public health and safety or to promote the protection of the environment;*
> > *(c) the personal information is relevant to a fair determination of the applicant's rights;*

(d) the disclosure will assist in researching the claims, disputes or grievances of aboriginal people;
(e) the third party will be exposed unfairly to financial or other harm;
(f) the personal information has been supplied in confidence;
(g) the personal information is likely to be inaccurate or unreliable; and
(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

(3)*A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*

(a) the personal information relates to a medical, dental, psychiatric, psychological or other health-care history, diagnosis, condition, treatment or evaluation;
(b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
(c) the personal information relates to eligibility for income assistance or social-service benefits or to the determination of benefit levels;
(d) the personal information relates to employment or educational history;
(e) the personal information was obtained on a tax return or gathered for the purpose of collecting a tax;
(f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;
(g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations;
(h) the personal information indicates the third party's racial or ethnic origin, sexual orientation or religious or political beliefs or associations; or
(i) the personal information consists of the third party's name together with the third party's address or telephone number and is to be used for mailing lists or solicitations by telephone or other means.

(4)A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

(a) the third party has, in writing, consented to or requested the disclosure;
(b) there are compelling circumstances affecting anyone's health or safety;
(c) an enactment authorizes the disclosure;
(d) the disclosure is for a research or statistical purpose and is in accordance with Section 29 or 30;

(e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff;
(f) the disclosure reveals financial and other similar details of a contract to supply goods or services to a public body;
(g) the information is about expenses incurred by the third party while travelling at the expense of a public body;
(h) the disclosure reveals details of a licence, permit or other similar discretionary benefit granted to the third party by a public body, not including personal information supplied in support of the request for the benefit; or
(i) the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body, not including personal information that is supplied in support of the request for the benefit or is referred to in clause (c) of subsection (3).

(5)*On refusing, pursuant to this Section, to disclose personal information supplied in confidence about an applicant, the head of the public body shall give the applicant a summary of the information unless the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information.*

(6)*The head of the public body may allow the third party to prepare the summary of personal information pursuant to subsection (5). 1993, c. 5, s. 20.*
[Emphasis added]

Section 20 is a mandatory exemption. When it is a mandatory exemption – in this case personal information of a third party – a public has no authority to release the information to an applicant if the information falls within the definition of personal information, which is information that if released would be an unreasonable invasion of a third party's personal privacy. The Commission believed that the information may fall within the definition of personal information and, on that basis, sought consent of the Third Party and refused access to the Applicant.

The *Act* provides a non-exhaustive list of what is considered personal information. First a public body must establish that the information sought is personal information. Then it must work its way through section 20 as indicated in the Supreme Court of Nova Scotia case, *Re House*, [2000] N.S.J. No 473 (S.C.). Moir J. discussed the process to be followed in assessing whether personal information should be released. Justice Moir stated, at para. 8:

. . . I propose to consider this appeal in the following way:

1. Is the requested information "personal information" within s. 3(1)(i)? If not, that is the end. Otherwise, I must go on.
2. Are any of the conditions of s. 20(4) satisfied? If so, that is the end. Otherwise. . .

3. Is the personal information presumed to be an unreasonable invasion of privacy pursuant to s. 20(3)?
4. In light of any s. 20(3) presumption, and in light of the burden upon the appellant established by s. 45(2), does the balancing of all relevant circumstances, including those listed in s. 20(2), lead to the conclusion that disclosure would constitute an unreasonable invasion of privacy or not?

The initial question is – does the information requested constitute "personal information"?

Personal information is defined in s. 3 of the *Act* as follows:

3 (1)(i) "personal information" means recorded information about ***an identifiable individual****, including*

> *(i) the individual's name, address or telephone number,*
> *(ii) the individual's race, national or ethnic origin, colour, or religious or political beliefs or associations,*
> *(iii) the individual's age, sex, sexual orientation, marital status or family status,*
> *(iv) an identifying number, symbol or other particular assigned to the individual,*
> *(v) the individual's fingerprints, blood type or inheritable characteristics,*
> ***(vi) information about the individual's health-care history, including a physical or mental disability,***
> ***(vii) information about the individual's educational, financial, criminal or employment history,***
> *(viii) anyone else's opinions about the individual, and*
> *(ix) the individual's personal views or opinions, except if they are about someone else;*

[Emphasis added]

The information that is the subject of this Application for Access to a Record is first, an absentee report of an identifiable individual and second, a statement of earnings and income. The two parts of the Record relate to a Third Party, an employee of the Commission who is a public servant.

The *Act* provides a definition of employee, which reads:

3 *(1) In this Act,*

> *(b) "employee", in relation to a public body, includes a person retained under an employment contract to perform services for the public body;*

For the purposes of the *Act,* the Commission is a public body specifically listed in the Schedule.

The *Legal Aid Act* provides:

> *7(2) For all purposes of the Public Service Superannuation Act, every person employed by the Commission, otherwise than temporarily, is deemed to be a person employed in the public service of the Province and service in the employment of the Commission is deemed to be public service.*

The Commission website notes the following:

> *The Commission delivers most of its services via a network of 16 community-based law offices as well as 1 sub-office known as the Nova Scotia Legal Aid. The offices are staffed by salaried lawyers and, in certain situations, supplemented by lawyers in private practice on a fee-for service basis.*

Various cases from Ontario assist in making the distinction between information about a person in his/her personal capacity versus his/her professional capacity. For example:

> *The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information. [Order 11].*
> *To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual. [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].*
> *Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].*
> *[MO-2222]*

The *Act* distinguishes which party has the burden of proof on whether or not the information that is the subject of the Application for Access to a Record is "personal information" under the *Act*. First, the public body must establish that the information is "personal information" and thereafter the onus shifts to the applicant to show that the release of the personal information is not an unreasonable invasion of privacy. Section 45 provides as follows:

> *(1) At a review or appeal into a decision to refuse an applicant access to all or part of a record, the burden is on the head of a public body to prove that the applicant has no right of access to the record or part.*
>
> *(2) Where the record or part that the applicant is refused access to contains personal information about a third party, the burden is on the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.*

(3) At a review or appeal into a decision to give an applicant access to all or part of a record containing information that relates to a third party,

> ***(a) in the case of personal information, the burden is on the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy; and***
> *(b) in any other case, the burden is on the third party to prove that the applicant has no right of access to the record or part.*

[Emphasis added]

Therefore, in this case, if the information is "personal" the Applicant bears the burden. If not, the public body has the onus to say why the information should not be released.

The question is, therefore, is this information "personal"? The definition of "personal information" in s. 3 of the *Act* definitely makes reference to information about health care and employment history. If that section is given a broad and liberal interpretation, the Record sought could fall within those general definitions.

In this case, I find the information with respect to the attendance record showing days worked and off work and the regular pay schedule showing salary for a Third Party fall within the definition of personal information. The onus is on the Applicant to prove that disclosure of this personal information would not result in an unreasonable invasion of the Third Party's privacy.

PERSONAL INFORMATION IN THE PUBLIC DOMAIN

Part of the argument advanced by the Applicant is that the information about the Third Party is information that:

1. with respect to the attendance record is information that s/he has made public through a letter to the Court and an Affidavit from the Third Party's client that was filed with the Court regarding the lawyer's illness, not anything about the illness itself;
2. with respect to regular pay schedule the information relates to his or her work as a public servant.

With respect to the Applicant's argument that because the information in Record #1 – the absentee report – is already in the public domain, it should be disclosed, I agree. Notwithstanding that the information contained in Record #1 falls within the definition of personal information, the Third Party has made it public by his/her own actions.

With respect to personal information in the public domain, the case law appears to focus on how the information came to be made public as to whether or not that waived its otherwise private nature.

[40] The Board acknowledged that, although the entire record has not been disclosed, the applicant and the public "know a good deal" about the record, including its inscription and the fact that it is a used target. However, the Board argued, the fact that there has been media coverage about the record and that the Board and the third party have made public statements about it "did not displace or 'waive' [the record's] otherwise private character" and turn it into a "public document".26
[41] In support of this argument, the Board referred to Order No. 43-1995, 27 where Commissioner Flaherty remarked that previous leaks of a record to the media do not mean a record is in the "public domain". Similarly, in the Board's submission, the summary of the contents of the record in the PCC's report "did not displace the private nature of the Record." The Board does not believe the applicant is entitled to any more information than the summary he has already received through his own efforts and the PCC report.28
[42] I take the Commissioner to mean in Order No. 43-1995 that, in that case, the leak, that is, the unauthorized disclosure, of a record was not an appropriate relevant circumstance to consider under s. 22(2) and did not rebut the presumed unreasonable invasion of privacy. There is, of course, no suggestion that the public disclosure of information about the incident in this case, in the form of the PCC report and City of Vancouver media releases, was unauthorized. Order No. 43-1995 therefore does not assist the Board.
[43] As I intimated earlier, however, it is relevant—and I give considerable weight to the fact—that, through the PCC report and the media releases about the incident, not to mention the extensive attendant media coverage, the nature of the record, the contents of the inscription and the resolution of the incident as a disciplinary matter are already publicly known. This relevant circumstance favours disclosure of the inscription and rebuts the presumption in s. 22(3)(d). [BC Order F08-20]

Another case that is of assistance about material in the public domain is another BC Order, which stated as follows:

One of the issues raised by one of the applicants is that the letter in dispute is already in the public domain, because, early in 1995, he was shown a copy by an inexperienced clerk for the Town of View Royal. I wish to note that a record under the Act may be leaked to the media, published in a newspaper, circulated in photocopies, or be shown to a subsequent applicant. But a subsequent request for access to the same record, if one were to occur, would have to be treated like any other access request and processed under the relevant terms of the legislation. Of course, if a record is truly in the public domain, in the sense of existing in multiple copies with no controls on their re-dissemination, then an access request is unnecessary. However, the letter in dispute in the current inquiry is not in the public domain in that sense.
[BC Order 43-1995 (referred to in F08-20 above)]

With respect to Record #1 – the absentee report - the Applicant has argued, in order to meet his/her statutory burden, that the Third Party wrote a letter to the Judge

about his/her sick leave and the Third Party's client has sworn an Affidavit to the same effect, both of which are in the public domain. The Third Party cannot shield this information now that it has been made public by the Third Party him/herself. This is not a case where the Record was leaked or otherwise made its way into the public domain. To justify disclosure under access legislation by stating it was already in the public domain when the original release was a leak or done improperly is unacceptable. In this case, however, the Third Party made the information public and therefore cannot try to now shield it from the Applicant.

Notably Record #1 is an absentee report and will indicate only if the Third Party was absent and for what reason. In the case of sick leave there is no personal health information whatsoever contained in the Record.

REMUNERATION AS EMPLOYEE OF A PUBLIC BODY

With respect to Record #2 – the Third Party's pay stubs – the Commission argues that these fall within the definition of personal information. For ease, the relevant portion of s. 3 is reproduced:

> *3 (1)(i) "personal information" means recorded information about an identifiable individual, including. . .*
>
> > *(vii) information about the individual's. . . employment history,*

Under s. 20(1), the *Act* prohibits a public body from releasing personal information of a Third Party to an Applicant if it would be an unreasonable invasion of his/her privacy. Section 20(3) of the *Act* lists the kinds of information the disclosure of which will fall under a presumption that there will be an unreasonable invasion of a third party's privacy. Paragraph (f) is reproduced here for ease:

> *(f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;*

Again, if the *Act* is given broad and liberal interpretation, Record #2 could fall within the meaning of personal information about "income" and "financial history".

Section 20(4)(e), however, lists when disclosure of personal information is not an unreasonable invasion of a third party's personal privacy. For ease that subsection is referenced here:

> *A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if. . .*
>
> > *(e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff;*

As discussed above, the Third Party in this case is an employee of a public body, the Commission, and Record #2 is information about the Third Party's remuneration as an employee. The question, therefore, is does the exception in s. 20(4)(e) apply to displace the exemption in s. 20(1)? I find that the exception in s. 20(4)(e) does apply to the information because it is about the Third Party's remuneration as an employee of a public body. I am supported in that finding based on the following discussion.

The choice of the word "remuneration" in the *Act* is significant and specific. In other jurisdictions such as Alberta, Manitoba, Prince Edward Island and Ontario, wording such as "salary range" [which is what the Commission did provide to the Applicant] has been used. The Legislature must have intended the word remuneration to be specific.

In Nova Scotia, in accordance with the *Provincial Finance Act*, the Minister of Finances publishes the annual document, *Public Accounts Volume 3*, which lists the remuneration of all provincial public servants.

In a Review Report from this Office, the Review Officer recommended disclosure of the salaries. In that case, it was stated:

> *It is understandable that people regard their incomes as personal information they want to keep private.* ***Section 20(1)*** *obliges a public body to refuse to disclose personal information if disclosure would constitute an unreasonable invasion of personal privacy.* ***Subsection 20(4)*** *lists circumstances and conditions when disclosure of personal information would not be unreasonable. One of them is if "the information is about the third party's position, functions or remuneration as . . . an employee . . . of a public body". (emphasis added) The federal Information Commission holds the view that public servants cannot expect the same level of privacy protection as do private citizens. The Nova Scotia Supreme Court believes that the potential of embarrassment to individuals should not be a determining factor. [McCormick v. NS (Attorney General) et al) SN No. 08098 (1993)]*
> ***[Emphasis in original]***
> *[FI-00-98]*

Similar rulings from other Commissioners in jurisdictions with the same statutory provisions as Nova Scotia held that pay information about a third party who is an employee of a public body can be released:

> *The Ministry has withheld other pages in their entirety under section 22 of the Act. They comprise payroll and leave verification notes, time entry and pay authorizations, leave management transactions, attendance logs, and overtime records. Although they concern specific persons other than the applicant, I find that under section 22(4)(e) a number of these pages can be disclosed to the applicant with a modest amount of severing, since they concern third parties' position, functions, or remuneration as an employee of the Ministry.*
> *[BC Order 112-1996]*

With respect to the final question – can the information that is found to constitute "personal information" be severed from the Record, in accordance with section 5(2) of the *Act*? Subsection 5(2) of the *Act* reads as follows:

> *The right of access to a record does not extend to information exempted from disclosure pursuant to this Act, but if that information can reasonably be severed from the record an applicant has the right of access to the remainder of the record.*

I have reviewed Record #2 and find that the personal information can be severed. Therefore, with a modest amount of severing [Employee ID number and home address] the Applicant is entitled to a copy of Record #2 because the information is about the Third Party's remuneration as an employee of a public body.

TIMELINESS OF COMMISSION'S RESPONSE TO APPLICANT

The Applicant's final submission raised the issue of whether or not the Commission had responded in a timely manner. The Applicant believes the Commission was delayed in its response to his/her Application for Access to a Record.

The following is a timeline of the dates:

TIMELINE:

April 7, 2008	Informal request made for Records under Routine Access Policy.
April 30, 2008	Denial of Routine Access Request by Commission.
May 20, 2008	Form 1 submitted by Applicant to the Commission.
May 28, 2008	Third Party notice/consultation sent to Third Party. Commission did not send a copy to the Applicant.
May 28, 2008	Notice to Applicant from Commission that $25 fee must be paid by certified cheque [8 days].
June 6, 2008	Fee paid by Applicant [Day 1]
June 9, 2008	Third Party response received by Commission.
June 26, 2008	Decision Issued 20 days from when fee was paid which is the actual start date and 37 days from submission of Form 1.

The Commission is required by statute to respond to the Applicant in a specific time period pursuant to s. 7(2) of the *Act*, which provides:

> *The head of the public body **shall** respond in writing to the applicant within thirty days after the application is received and the applicant has met the requirements of clauses (b) and (c) of the subsection (1) of Section 6…*
> ***[Emphasis added]***

Clauses (b) and (c) of s. 6(1) require an applicant to provide specifics about the subject-matter of the record to enable the public body to identify the record and pay any fees required, respectively.

Section 11 of the *Act* lays out the provisions with respect to the fees and s. 6 of the *Regulations* prescribes the application fee to be in the amount of $25.00. There is ***no*** requirement for the fees to be paid by certified cheque.

The Applicant is required by statute to pay the fee in advance of the "clock starting" under the statute. The fee was paid and the Commission's decision was issued 20 days after that, and thus within the timeframe of 30 days under the *Act.* The Applicant considered there was delay because it was 37 days from the time s/he filed the Form 1 until the date of the decision.

The Commission is under a duty to assist the Applicant. The Commission cannot avoid the timelines under the statute by delaying giving information to the Applicant about the necessity to pay a fee. A simple phone call to the Applicant on May 28, 2008 when the Form 1 was first received would have enabled the Applicant to pay the $25.00 forthwith and thereby "start the clock." Imposing a requirement that the application fee be paid by certified cheque is not appropriate as no such requirement is provided for by the statute and likely only worked to further delay payment by imposing this step on the Applicant.

The delay in part was due to notice to a third party. The Commission is required to give notice to a third party where it has reason to believe the information requested ***must*** be refused under s. 20 or s. 21 of the *Act.* Section 22 provides as follows:

> *(1) On receiving a request for access to a record that the head of a public body has reason to believe contains information the disclosure of which must be refused pursuant to Section 20 or 21, the head of the public body shall, where practicable, promptly give the third party a notice*
>
> > *(a) stating that a request has been made by an applicant for access to a record containing information the disclosure of which may affect the interests or invade the personal privacy of the third party;*
> > *(b) describing the contents of the record; and*
> > *(c) stating that, within fourteen days after the notice is given, the third party may, in writing, consent to the disclosure or may make written representations to the public body explaining why the information should not be disclosed.*
>
> *(1A) Notwithstanding subsection (1), that subsection does not apply if*
>
> > *(a) the head of the public body decides, after examining the request, any relevant records and the views or interests of the third party respecting the disclosure requested, to refuse to disclose the record;*
> > *(b) where the regulations so provide, it is not practical to give notice pursuant to that subsection.*

On the basis of the requirement in s. 22, the Commission correctly gave notice to the Third Party that information about him or her is the subject of an Application for Access to a Record and stated the following:

> *As the person responsible for dealing with requests made pursuant to the FOIPOP Legislation, I'm obliged to ask you whether you consent to the release of this information.*

The Commission is mistaken. Public bodies are not obliged to seek the consent of a third party; they are obliged to give them notice. What the legislation does contemplate is that where a third party has consented, the disclosure would not be considered an unreasonable invasion. The *Act* provides as follows:

> *20(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if*
>
> > *(a) the third party has, in writing, consented to or requested the disclosure;*

I believe the complaint from the Applicant with respect to the timeliness of the Commission's response is a result of the fact that when s/he made the initial request under the Commission's Routine Access Policy, the Commission took three months to respond. When the Applicant complained about that delay, the Commission never responded to the complaint. The Applicant then made the Application for Access to a Record under the *Act* for the same information and the Commission took 23 days of the initial 30 days it is allowed under the *Act* in order to respond. Even though strictly speaking timelines were met, to the Applicant, that approach by the Commission seemed inconsistent with the duty to assist.

STANDARD OF REVIEW

The Commission sought to have the Review Officer clarify the standard of review employed in Reviews under the *Act* prior to making its final submission. I refused to do so and advised the Commission that asking for this kind of preliminary question to be answered by an independent oversight body outside the parameters of the Review itself was inappropriate.

The Commission provided an extensive submission with respect to the standard of review it considered appropriate, which I indicated could be considered as part of the formal Review if it indicated a desire for me to do so. The Commission did so indicate.

The Commission correctly cites the Supreme Court of Canada's analysis in *New Brunswick v. Ryan* case and more recently the *Dunsmuir* that have been relied upon by our Court of Appeal in the *Lienaux v. Nova Scotia Barristers' Society* case with respect to the approach taken by courts in reviewing administrative decision-makers. The error I believe the Commission makes in its analysis is that it seeks to apply this analysis to itself as a FOIPOP Administrator. The Commission is not an administrative tribunal for the

purposes of the *Act*. Therefore, with great respect, the analysis of the courts is with respect to the extent to which it would show deference to an administrative body established by statute. The *Act* establishes the Review Officer as the independent oversight body mandated to make findings and recommendations.

> *Deference in the context of reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime"…In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.*
> *[Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190, 2008 SCC 9, at para. 49 cited with approval in Lienaux v. Nova Scotia Barristers' Society, [2009] N.S.C.A. No. 11, at para. 19]*

It is conceivable that a judicial review application could be made with respect to the Review Officer. In this case, I would suggest that the test relied upon in *Lienaux* of showing deference to an independent administrative body with expertise in its designated mandate would apply:

> *In reality, this issue involves the Panel's statutory right to control its own process under the enabling legislation. When deciding the extent of its investigation, the Panel was therefore exercising its discretion and interpreting the enabling statute. This calls for deference. (Dunsmuir 53-54; Ryan 42)*
> *Considering the overall guidance offered by* ***Ryan*** *and the true nature of this question, the standard of review arrows point conclusively to* ***reasonableness.***
> ***[Emphasis in the original]***
> *[Lienaux v. Nova Scotia Barristers' Society, [2009] N.S.C.A. No. 11, at para. 29]*

Under the *Act* an applicant has the following three choices when s/he is not satisfied with a public body's decision regarding an Application for Access to a Record:

1. Request a Review from the Review Officer;
2. Apply to the Supreme Court of Nova Scotia in the first instance;
3. Request a Review from the Review Officer and if unsatisfied with that result may apply to the Supreme Court of Nova Scotia where the matter will be heard as a trial *de novo.*

The *Act* makes a specific distinction between the powers granted to the Supreme Court and the powers of the Review Officer.

With respect to what the statute provides with respect to the Nova Scotia Supreme Court, section 42(6) says:

> *Where the Supreme Court finds that a record falls within an exemption, the Supreme Court shall not order the head of the public body to give the applicant access to the record, regardless of whether the exemption requires or merely authorizes the head of the public body to refuse to give access to the record.*

On the other hand, the statute gives the Review Officer wide latitude in the scope of her Review in s. 39(2) which says:

> *In the report, the Review Officer* ***may make any recommendations*** *with respect to the matter under review that the Review Officer considers appropriate.*
> ***[Emphasis added]***

This means that the Court cannot exercise its discretion differently from the public body, if the exemption is found to apply. The public body still has the power to decide if the exemption applies or not. The *Act* ***does not*** impose the same restraint on the Review Officer. She has considerable latitude in what she can find and recommend within the parameters of the statute. This could include a recommendation to a public body to exercise its discretion differently.

FINDINGS

1. The Record at issue in this Interim Review does not fall under the Routine Access Policy of the Commission.
2. The Nova Scotia Legal Aid Commission is listed in the Schedule of the *Act* as a public body under the *Act*.
3. The Third Party is a staff person working for the Commission and is considered a public servant and an employee under the *Act.*
4. The Commission gave notice to the Third Party that personal information about him/her was the subject of an Application for Access to a Record.
5. The Commission can seek the consent of the Third Party regarding the release of the responsive Record but is not obliged to rely on it.
6. The Commission's failure to provide the Applicant with a letter advising of the need to notify the Third Party was contrary to the requirements imposed on a public body under the *Act*.
7. The Commission made its decision within the 30 day statutory requirement.
8. Failing to advise the Applicant of the application fee requirement promptly was inconsistent with the duty to assist and imposing the need for the cheque to be certified was contrary to the provisions of the *Act* and the *Regulations*.
9. When the Third Party responded to the Commission seeking consent to the release of the Record, at no time did s/he claim solicitor-client privilege on behalf of a client but chose only to refuse consent on the basis that disclosure would be an unreasonable invasion of his or her privacy. While the Commission was only notifying the Third Party that an Application for Access to a Record had been made with respect to information that may be personal information, had the Third

Party solicitor considered the information privileged on behalf of his or her client, it would have been reasonable to assume that solicitor-client privilege would be claimed.

10. The onus is on the Commission to prove a record contains information falling within the definition of personal information. Record #1 consists of a Third Party's attendance record at work and Record #2 the regular pay schedule showing salary. Record #1 is information that can be characterized as "information about an identifiable individual including information about the individual's health-care history" and Record #2 could fall within the meaning of "information about an identifiable individual including information about the individual's…financial…or employment history" and therefore both Record #1 and #2 fall within the definition of personal information under the *Act.*
11. Because the information sought falls within the definition of personal information, the onus is on the Applicant to prove that disclosure of this personal information would not result in an unreasonable invasion of the Third Party's privacy.
12. The Applicant successfully demonstrated that disclosure of Record #1 would not be an unreasonable invasion of the Third Party's privacy because the Third Party has already put the information in the public domain. The Third Party made the information public and therefore cannot try to now shield it from the Applicant.
13. The exception to the exemption in s. 20(4)(e) applies to the information because it is about the Third Party's remuneration as an employee of a public body.
14. Record #2 can be released to the Applicant with a modest amount of severing [Third Party's Employee ID number and home address].
15. The Commission is not an administrative tribunal under the *Act.*
16. The Freedom of Information and Protection of Privacy Review Officer is an independent oversight administrative body set up under the *Act* whose reports with findings and recommendations are entitled to deference from the Courts. In the result, in most instances, the test for a reviewing Court will be reasonableness not correctness.

RECOMMENDATION

The Review Officer recommends that the Nova Scotia Legal Aid Commission release to the Applicant Record #1 in its entirety and Record #2 with minimal severing of the Third Party's employee identification number and home address.

Respectfully submitted,

Dulcie McCallum
Freedom of Information and Protection of Privacy Review Officer